

STATE OF NORTH CAROLINA

WAKE COUNTY

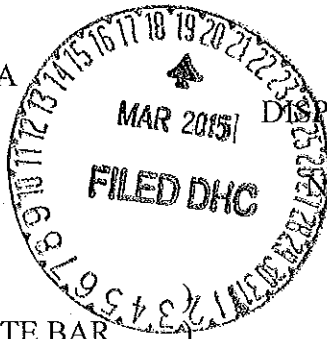
THE NORTH CAROLINA STATE BAR,

Plaintiff,

v.

JERRY R. TILLET,

Defendant.



BEFORE THE  
DISCIPLINARY HEARING COMMISSION  
OF THE  
NORTH CAROLINA STATE BAR  
15 DHC 7

**MOTION TO DISMISS IN LIEU OF  
ANSWER**

NOW COMES, Defendant, Jerry R. Tillett ("Tillett" or "Defendant"), by and through counsel, pursuant to 27 NCAC 01B .0114(n) and Rule 12 of the North Carolina Rules of Civil Procedure, moves the Disciplinary Hearing Commission ("DHC") for an order dismissing the Complaint. In furtherance thereof, Defendant shows unto the DHC the following:

**I. The State Bar Lacks Jurisdiction.**

1. The North Carolina State Bar ("State Bar") filed the Complaint against Tillett on March 5, 2015, without subject matter jurisdiction.
2. The State Bar "derive[s] its jurisdiction by legislative act[.]" 27 NCAC 01B .0102(3).
3. The statutory authority for the State Bar to discipline attorneys is set forth in N.C. Gen. Stat. § 84-23. See 27 NCAC 01b .0104 (setting forth the powers and duties of the State Bar).
4. The State Bar "is vested, as an agency of the state, with the control of the discipline, disbarment, and restoration of attorneys practicing law in this state." 27 NCAC 01B .0102(1) (emphasis supplied).

5. The Complaint fails to allege that Tillett was “practicing law.” The Complaint discloses on its face that Tillett was acting solely in his capacity as a superior court judge. See, e.g., Compl. ¶¶ 3, 36, 76.

6. The statutory definition of “practicing law” does not encompass the duties of judges. In order to “practice law,” one must “perform[] any legal service for any other person, firm or corporation[.]” N.C. Gen. Stat. § 84-2.1.

7. There are no allegations in the Complaint that Tillett was performing legal services for “any other person, firm or corporation[.]”

8. If acting in a judicial capacity were the “practice of law,” a judge would be guilty of a Class 3 misdemeanor and subject to a \$200 fine every time he or she held court. N.C. Gen. Stat. § 84-2 (prohibiting a judge from engaging in the private practice of law).

9. As the State Bar’s own rules recognize, judicial misconduct is to be reported to and governed by the Judicial Standards Commission, not the State Bar. See 27 NCAC 02 Rule 8.3 (when a judge violates “applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office [an attorney] shall inform the North Carolina Judicial Standards Commission[.]” (emphasis supplied).

10. Final authority to discipline judges lies solely with the Supreme Court. In re Hayes, 356 N.C. 389, 398, 584 S.E.2d 260, 266 (2002).

11. Moreover, “[w]hether or not [a] judge’s comments violated the Code of Judicial Conduct is the province of the Judicial Standards Commission.” Carpenter v. Carpenter, 189 N.C. App. 755, 759, 659 S.E.2d 762, 765 (2008).

12. The authority to impose discipline against a judge is set out by N.C. Gen. Stat. § 7A-374.1. The State Bar is not identified as an entity that may impose such discipline. See, e.g.,

Warren v. Bray, No. 1:13CV1144, 2014 WL 3404962, at \*6 (M.D.N.C. July 10, 2014) (“This Court also does not have the power to grant Plaintiff’s requested relief that Judge Bray’s ‘judicial license’ be suspended or revoked. See N.C. Gen. Stat. § 7A–374.1 (2013).”)

13. Specifically, Chapter 7A of the North Carolina General Statutes sets forth the “procedure for discipline of any judge or justice of the General Court of Justice.” Any such discipline “shall be in accordance with” Article 30 of Chapter 7A. N.C. Gen. Sta. § 7A-374.1 (emphasis supplied). Thus, the Chapter 7A process for disciplining judges is exclusive.

14. The State Bar’s jurisdiction to discipline attorneys is set out in Chapter 84, not Chapter 7A, and Chapter 7A does not confer jurisdiction on the State Bar to discipline judges.

15. Indeed, Article IV, Section 17, of the North Carolina Constitution provides, in part, that “[t]he General Assembly shall prescribe a procedure . . . for the censure and removal of a Justice or Judge of the General Court of Justice for . . . conduct prejudicial to the administration of justice[.]”

16. The procedure prescribed by the General Assembly is the Judicial Standards Act, which is codified in Chapter 7A. In re Martin, 295 N.C. 291, 300, 254 S.E.2d 766, 771 (1978).

17. The Supreme Court has conclusively ruled that “we are of the opinion that ratification of the [Constitutional] amendment carried with it an expression of the will of the people that the Constitution be amended so as to empower the Legislature to confer upon [the Supreme] Court original jurisdiction over the censure and removal of judges.” Id. at 300, 254 S.E.2d at 772.

18. The State Bar is now seeking to discipline Tillett for conduct “prejudicial to the administration of justice” even though the North Carolina Constitution and the Judicial Standards Act expressly and exclusively confers upon the Supreme Court such authority.

19. The State Bar's attempt to exercise jurisdiction is in contravention of the North Carolina Constitution, which "expresses the will of the people of this State and is, therefore, the supreme law of the land." Id. at 299, 254 S.E.2d at 771.

20. As such, the State Bar is not empowered to impose discipline against a judge for his conduct in his judicial office.

21. The State Bar itself has previously acknowledged its lack of jurisdiction to even opine as to a judge's conduct in two (2) ethics opinion. As recently as 2013, the State Bar opined that: "Opinion on the professional conduct of judicial officers is outside the purview of the Ethics Committee. Therefore no opinion will be offered in response" to whether a judge "violate[d] the Rules of Professional Conduct or the Code of Judicial Conduct[.]" 2013 Formal Ethics Opinion 6. This Opinion is attached hereto as **Exhibit A**.

22. Previously, in RPC 208 (filed July 21, 1995), the State Bar opined that: "Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed as to the ethical duty of a judge in this situation." RPC 208 is attached hereto as **Exhibit B**.

23. The State Bar's own website states that: "Complaints about North Carolina judges go to the NC Judicial Standards Commission, PO Box 1122, Raleigh NC 27602[.]" See <https://www.ncbar.com/public/intro.asp> (lasted visited 16 March 2015). A printout of that page is attached hereto as **Exhibit C**.

24. Ultimately, the State Bar does not have jurisdiction because: (1) Tillett was not "practicing law" as defined in Chapter 84; and (2) disciplinary actions brought against a judge must be brought pursuant to Chapter 7A. The State Bar is granted no authority whatsoever under Chapter 7A. Therefore, the Complaint against Tillett should be dismissed.

## **II. The State Bar is Estopped from Pursuing the Complaint.**

25. The State Bar has been informed by Tillett that the conduct alleged in the Complaint has already been the subject of a Judicial Standards Commission inquiry which has been fully and completely resolved.

26. The State Bar filed the present action against Tillett nearly two (2) years after the Judicial Standards Commission filed its Order on March 8, 2013.

27. This belated effort by the State Bar to again discipline Tillett is barred by collateral estoppel. See Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

28. The doctrine advances the twin policy goals of "protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." Id. at 15-16, 591 S.E.2d at 880.

29. The facts alleged in the Complaint, as well as those in the Judicial Standards Commission's Order and complaint, are virtually identical, yet the State Bar is seeking to relitigate these previously decided facts, and impose discipline for the same conduct for which Tillett has already been disciplined.

30. The Complaint should therefore be dismissed, as collateral estoppel exists to "protect[] litigants from the burden of relitigating previously decided matters[.]"

31. Moreover, the State Bar has on at least two (2) occasions prior to Tillett consenting to the Judicial Standards Commission's Order, acknowledged that the State Bar is without authority to say whether a judge has violated his or her ethical obligations. See Exhibits A and B, attached hereto.

32. Tillett relied upon these statements and advice of his counsel as to the exclusive authority of the Judicial Standards Commission in agreeing to forego a challenge to the Judicial Standards Commission's findings.

33. The State Bar, in clear contravention of its own statements and prior rulings, is now seeking to do exactly what it has previously stated that it could not. The State Bar is therefore estopped from now taking a contrary position. See Whitacre, infra.

### **III. Tillett Is Being Denied Due Process.**

34. Fundamental fairness and due process dictate that the Complaint be dismissed.

35. Due process is "a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual." In re Lamm, 116 N.C. App. 382, 385, 448 S.E.2d 125, 128 (1994) aff'd, 341 N.C. 196, 458 S.E.2d 921 (1995)

36. "Due process means simply a procedure which is fair and does not mandate a single, required set of procedures for all occasions; it is necessary to consider the specific factual context and the type of proceeding involved." Id.

37. The State Bar has been informed that the Judicial Standards Commission's Order prevents Tillett from involving himself in the transaction or series of transactions described to the Complaint.

38. The Judicial Standards Commission's Order prevents Tillett from "participat[ing] in any hearing or legal proceeding, [ ]or communicat[ing] his opinion o[n] any pertinent facts to any judicial official unless compelled to by subpoena, concerning[:]" (1) any petition to remove the District Attorney; any petition to remove the Chief of Police of Kill Devil Hills (or other

officer or town official); or (3) personnel matters or professional grievances related to the Police Department of Kill Devil Hills.

39. The allegations in the Complaint relate to petitions to remove certain public officers as well as personnel and/or professional grievances related to the Police Department of Kill Devil Hills.

40. As such, Tillett may be prohibited from fully responding to the substantive allegations in the Complaint.

41. Due process, however, requires an unimpaired opportunity to controvert the allegations in the Complaint. Tillett will unquestionably be denied that opportunity. Id.

42. Being unable to freely respond to the factual allegations contained in the Complaint, despite the State Bar having actual knowledge that Tillett could not so respond, is a denial of due process.

43. Moreover, the incidents alleged in the Complaint are now nearly five (5) years old. With the passage of time, memories have faded and documents have been lost or not preserved. A critical witness, District Attorney Parrish, is now deceased. Many of the other witnesses are biased due to self-interest. Significantly, the evidence is in sharp conflict, belying the existence of evidence which satisfies the clear and convincing standard. See e.g., In re Inquiry Concerning a Judge, 356 N.C. at 406, 584 S.E.2d at 270-71 (where the evidence was in sharp conflict, the Judicial Standards Commission did not carry its burden to establish clear and convincing evidence)

44. The Complaint should therefore be dismissed, in that the State Bar has violated Tillett's due process rights.

#### **IV. Conclusion.**

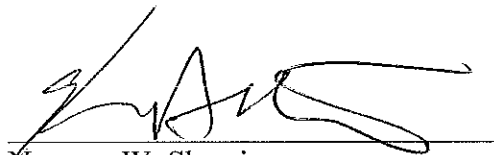
45. In conclusion, the State Bar has no jurisdiction to discipline a judge acting in his or her judicial capacity. Significantly, the State Bar has failed to even allege that Tillett was engaged in the practice of law, and no facts exist to support such an allegation. Only the Supreme Court and the Judicial Standards Commission may discipline a judge. In re Hayes, 356 N.C. 389, 398, 584 S.E.2d 260, 266 (2002); Carpenter v. Carpenter, 189 N.C. App. 755, 759, 659 S.E.2d 762, 765 (2008). The State Bar has no authority to discipline Tillett under Chapter 7A. Therefore the Complaint must be dismissed.

46. The exact same factual allegations of judicial misconduct by Tillett have been finally resolved by the Judicial Standards Commission. The Complaint is therefore barred by estoppel.

47. Moreover, as a result of the Judicial Standards Commission's previous disciplinary action for virtually identical conduct, Tillett's ability to respond to the factual allegations contained in the Complaint is seriously impaired. Tillett has therefore been denied due process.

WHEREFORE, the Disciplinary Hearing Commission should dismiss the Complaint, as it lacks jurisdiction, the transactions have been previously litigated, and the disciplinary action is fundamentally unfair to Tillett and therefore denies him substantive due process.

This the 16<sup>th</sup> day of March, 2015.



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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served a copy of the foregoing  
MOTOIN TO DISMISS IN LIEU OF ANSWER upon the parties by depositing a copy hereof in  
a postpaid wrapper in a post office or official depository under the exclusive care and custody of  
the United States Postal Service, addressed as follows:

G. Patrick Murphy  
The North Carolina State Bar  
217 East Edenton Street  
Raleigh, NC 27611  
*Attorney for Plaintiff*

This the 16<sup>th</sup> day of March, 2015.

  
Kevin A. Rust



## 2013 Formal Ethics Opinion 6

July 19, 2013

### State Prosecutor Seeking Order for Arrest for Failure to Appear When Defendant is Detained by ICE

*Opinion rules that a state prosecutor does not violate the Rules of Professional Conduct by asking the court to enter an order for arrest when a defendant detained by ICE fails to appear in court on the defendant's scheduled court date.*

#### Inquiry #1:

A defendant is an undocumented alien who is arrested for a crime. He is given a secured bond by the magistrate, placed in custody in the jail, and served with a US Immigration and Customs Enforcement (ICE) detainer. The defendant hires a bondsman to pay the secured bond and the bondsman does so. ICE comes to the jail and takes the defendant into custody, transporting him to a federal holding facility. The defendant's court-appointed lawyer brings verification of the defendant's detention by ICE to the prosecutor handling the case. Later, the defendant's lawyer appears in court on the defendant's court date and explains to the court that the defendant is in the custody of ICE. The defense lawyer asks the state to have the defendant brought to trial, enter a voluntary dismissal, or dismiss the case with leave pursuant to N.C. Gen. Stat. §15A-932.

The prosecutor asks the judge to call the defendant for failure to appear and to issue an order for his arrest pursuant to N.C. Gen. Stat. §15A-305(b)(2) which provides that "[a]n order for arrest may be issued when...[a] defendant who has been arrested and released from custody pursuant to Article 26 of this Chapter, Bail, fails to appear as required."

The court enters a forfeiture of the bond pursuant to N.C. Gen. Stat. §15A-544.3(a), which provides that when a defendant who was released upon execution of a bail bond fails to appear before the court as required, the court shall enter a forfeiture for the amount of the bail bond in favor of the state and against the defendant and the surety on the bail bond. Nevertheless, N.C. Gen. Stat. §15A-544.3(b)(9) provides that a forfeiture of a bail bond will be set aside if, on or before the final judgment date, "satisfactory evidence is presented to the court" that one of a number of listed "events" has occurred. That list includes the following "event" at subparagraph (vii):

the defendant was incarcerated in a local, state, or federal detention center, jail, or prison located anywhere within the borders of the United States at the time of the failure to appear, and the district attorney for the county in which the charges are pending was notified of the defendant's incarceration while the defendant was still incarcerated and the defendant remains incarcerated for a period of 10 days following the district attorney's receipt of notice, as evidenced by a copy of the written notice served on the district attorney via hand delivery or certified mail and written documentation of date upon which the defendant was released from incarceration, if the defendant was released prior to the time the motion to set aside was filed.

N.C. Gen. Stat. §15A-544.3(b)(9); accord N.C. Gen. Stat. §15A-544.5(b)(7).

If ICE decides to release the defendant from custody and there is an outstanding order for his arrest from a North Carolina court, ICE will detain the defendant until he can be released to the custody of the State.<sup>1</sup> See N.C. Gen. Stat. §15A-761.

Is the prosecutor's conduct a violation of Rule 3.8 or any other Rule of Professional Conduct?

#### Opinion #1:

No. Rule 3.8, on the special responsibilities of a prosecutor, prohibits a prosecutor from prosecuting a charge that the prosecutor knows is not supported by probable cause. The comment to the rule, moreover, emphasizes the prosecutor's duty to seek justice. However, there is no legal requirement that a defendant's failure to appear in court be willful. In the instant inquiry, the legal requirements for requesting an order of arrest were satisfied and there was a procedural reason for seeking the order of arrest. Therefore, although the prosecutor knows that the defendant's failure to appear is not willful, the prosecutor's exercise of his professional discretion within the requirements of the law does not violate the Rules of Professional Conduct.

#### Inquiry #2:

Did the judge violate the Rules of Professional Conduct or the Code of Judicial Conduct by issuing the order for arrest and forfeiting the bond?

#### Opinion #2:

Opining on the professional conduct of judicial officers is outside the purview of the Ethics Committee. Therefore, no opinion will be offered in response to this question.

**Endnote**

1. As a practical matter, however, a person who is detained by ICE is rarely released. Deportation or federal incarceration is more likely.

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**THE NORTH CAROLINA STATE BAR**

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**RPC 208****July 21, 1995****Avoiding Offensive Trial Tactics**

*Opinion rules that a lawyer should avoid offensive trial tactics and treat others with courtesy by attempting to ascertain the reason for the opposing party's failure to respond to a notice of hearing where there has been no prior lack of diligence or responsiveness on the part of opposing counsel.*

**Inquiry #1:**

Attorney A, who represents the defendant in a civil matter, did not receive the notice of hearing from opposing counsel, Attorney X, because Attorney A's address had changed. At the civil district court calendar call for the first day of the session, when hearing dates are set, Attorney A did not appear nor did his client. Attorney X asked the court to set the matter for trial at the earliest possible date. The case was set for trial two days later. Neither the judge nor Attorney X inquired as to whether Attorney A had received the notice of hearing nor did they attempt to ascertain whether Attorney A was prevented from appearing at the calendar call by an emergency or otherwise. Attorney L, who was at the calendar call on an unrelated matter and who is not associated with either Attorney A or Attorney X, subsequently advised Attorney A of the trial date. Under these circumstances, before asking the court to set the case for trial, must Attorney X verify that the notice of hearing was actually received and that there was no emergency or other problem preventing the appearance of Attorney A or his client at the calendar call?

**Opinion #1:**

No, Attorney X is not required to verify that the notice of hearing was actually received by the opposing lawyer. However, Rule 7.1(a)(1) of the Rules of Professional Conduct provides that a lawyer does not violate the duty to zealously represent a client

...by acceding to reasonable requests by opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

Avoiding offensive tactics and treating others with courtesy includes not taking advantage of the opposing party or the opposing counsel's failure to respond to a notice of hearing when there has been no prior lack of diligence or responsiveness on the part of the opposing counsel. Under these circumstances, as a matter of professionalism, Attorney X should make a reasonable effort to ascertain Attorney A's whereabouts or the reason for his absence before asking the judge to schedule the hearing at the earliest possible date.

**Inquiry #2:**

Does the court have a duty to verify that Attorney A has received notice of the hearing?

**Opinion #2:**

Judges are subject to the Code of Judicial Conduct and the regulation of the Judicial Standards Commission. Therefore, no opinion is expressed to the ethical duty of a judge in this situation.

**Inquiry #3:**

Do the other lawyers at the calendar call have a responsibility to verify that Attorney A has received notice of the hearing or that there was no emergency or other problem preventing Attorney A's appearance at the hearing?

**Opinion #3:**

No. However, as a matter of professionalism, lawyers are encouraged to treat other practitioners with courtesy and to assist other practitioners in meeting the duty of competent representation.

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## Introduction

[Click here to view a flowchart of the State Bar's disciplinary procedure.](#)

### [How Lawyers are Disciplined](#)

This article appeared in the June 1, 2007, edition of the *News & Observer*. Written by the State Bar's Executive Director, it explains who the State Bar is, gives an overview of the disciplinary process, and what are the possible outcomes.

### [How the Disciplinary Hearing Commission \(DHC\) Works](#)

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All North Carolina lawyers must follow a code of ethics called the [Rules of Professional Conduct](#). The North Carolina State Bar's job is to investigate and, where appropriate, prosecute lawyers for violating those Rules.

If you think a lawyer has done something dishonest or unethical, you may file a complaint about the lawyer with the State Bar. The State Bar will review your complaint and, if the misconduct is proven, the State Bar may discipline the lawyer.

Here are some examples of the kinds of conduct that the NC State Bar can investigate:

- Your lawyer reveals confidential information without your permission
- Your lawyer misses important deadlines
- Your lawyer fails to tell you what is happening in your case
- Your lawyer won't turn over money s/he is holding for you
- Your lawyer represents someone whose interests conflict with yours

Not every disagreement between a lawyer and client involves a violation of the Rules of Professional Conduct, however. There are matters outside the jurisdiction of the State Bar as well as legal disputes that must be decided by the courts. Here are some examples of the kinds of conduct that the NC State Bar typically does not investigate.

- Complaints that a lawyer provided ineffective assistance of counsel in a criminal case
- Complaints that a lawyer has breached a contract or has failed to pay a debt
- Complaints that a district attorney decided not to prosecute a particular individual
- Complaints that are more than six years old—complaints must be filed within six years after the misconduct occurred

- Complaints against lawyers from other states
- Complaints about North Carolina judges go to the NC Judicial Standards Commission, PO Box 1122, Raleigh NC 27602

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